Double S Mining, Inc. *and* United Mine Workers of America, Region II, AFL–CIO. Case 9–CA–29246

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 6, 1992, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that it was the Union's intractable position on the Christmas bonus issue, and not a genuine impasse, which privileged the Respondent's unilateral payment of a $400 bonus to its employees—even though its last offer was for a bonus of $300. Thus, the Union's attorney at the December 9, 1991 negotiating session, and later in her December 16, 1991 letter to the Respondent's attorney, took the position for the Union that the payment and amount of the bonus were nonnegotiable, and that the Respondent had no choice under law but to ''pay the same bonus of $500 to the same employees as last year.''

Our dissenting colleague, however, states that he agrees with the judge's supposed finding that the parties reached a genuine impasse on this issue. While we agree with our dissenting colleague that an impasse would have limited the Respondent's options, requiring it to act consistently with its final offer of $300, we find, as did the judge, that no impasse was reached here because the Union was unwilling to negotiate at all with respect to this issue. In our view, genuine impasse requires that the parties have, at the least, mutually agreed that a subject matter is on the bargaining table, have discussed the matter, and, despite their best efforts to achieve agreement, neither is willing to move from its position. See, e.g., *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968). This standard was not met here; indeed it could not have been met because the Union simply refused to negotiate about the bonus.

As the judge found, the Union's attorney made it abundantly clear that the Respondent had paid a $500 Christmas bonus in the past and that nothing less would be acceptable. The Respondent offered the Union an opportunity to negotiate about the amount, but the Union asserted that the amount, by law, was a term of employment which could not be changed. This posture effectively put an end to negotiations before they started and precludes a finding that an impasse was reached. It also foreclosed any possibility that, as suggested by our dissenting colleague, the Union might have been willing to consider an offer of a $400 bonus. It would have been futile for the Respondent to have proposed it. Thus, we agree with the judge that the Respondent did not violate the Act by paying employees a Christmas bonus of $400 instead of its last offer of $300.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER OVIATT, dissenting in part.

Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(5) by its payment of a $400 Christmas bonus to employees in December 1991. I agree with the judge's finding that the Respondent bargained in good faith with the Union concerning the bonus to the point where the parties reached a genuine impasse on this issue. Thus, the Respondent was free to implement unilaterally the last Christmas bonus offer that had been offered to and rejected by the Union. In my view, however, the Respondent violated the Act because the bonus that it paid to employees was not the same as the bonus proposed in the Respondent's last offer.

The Respondent's final proposal before impasse was for payment of a $300 Christmas bonus to each employee on the active payroll. The Respondent, however, ultimately paid each employee a $400 Christmas bonus. As the judge properly acknowledged, an employer generally may not, after impasse, implement a proposal that is different from that which it previously offered to, and was rejected by, the union. *NLRB v. Katz*, 369 U.S. 736 (1962). The judge reasoned that this well-established rule did not apply here, because he found that the Union effectively had waived its interest in the subject matter of a Christmas bonus by its unyielding position ''that the entire subject was nonnegotiable'' based on the Union's belief that the employees were entitled to a $500 bonus as a matter of right.

I do not agree. I find no significant distinction between a typical impasse situation where the parties have exhausted all possibility of reaching an agreement on a particular subject and the situation presented here where the Union effectively declined to bargain on the subject of Christmas bonuses. I do not believe that an employer should be able to take more advantage of a situation where the union declines to bargain on a specific subject—that is, by being permitted to take unilateral action that varies from its last bargaining proposal—than it may when the parties reach a stalemate in negotiations.

In addition, because the Union was never given the opportunity to consider an offer of a $400 bonus, there is no basis for the judge's determination that the Respondent's uncommunicated position could not have had a salutary effect on the negotiations. The judge's inference that the Union would not have accepted an offer of a $400 bonus is pure conjecture. Seemingly intractable positions are often resolved following discussion. That is what collective bargaining is all about and we are obligated by our statute to support, not weaken, the collective-bargaining process.

Accordingly, I would find that the Respondent violated Section 8(a)(5) because its unilateral payment of the $400 Christmas bonus exceeded by $100 the bonus that the Respondent last offered before the parties reached a deadlock in their negotiations.

Julius U. Emetu II, Esq., for the General Counsel.
Fred F. Holroyd, Esq., of Charleston, West Virginia, for the Respondent.
Sherry Brashear, Esq., of Harlan, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Charleston, West Virginia, on June 3, 1992, on an original unfair labor practice charge filed on January 21, 1992, and a complaint issued on March 6, 1992, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the Christmas bonus that traditionally was given to employees. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record, including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, from facilities in Jodie, West Virginia, has been engaged in the mining of coal. In the course of that operation, during the 12-month period ending January 22, 1992, the Respondent purchased and received at the facility products and goods valued in excess of $50,000 directly from enterprises within the State of West Virginia, each of which received those goods directly from points outside the State of West Virginia.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the United Mine Workers of America, Region II, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

This case contains little in the way of factual conflict. The Union was certified on May 25, 1990, as the representative of the Respondent's employees at mining sites in Lizemores and Beech Glen, West Virginia. Since July 1990, the Union and the Respondent have been engaged in contract negotiations. At the time of the hearing, agreement had not been reached.

In past years, the Respondent had granted a Christmas bonus to its employees. However, in 1990, it apparently went unpaid, and unfair labor practice charges were filed in protest. That charge was adjusted in July 1991, with the Respondent agreeing to post a notice, and to comply with the following terms:

> WE WILL NOT withhold an annual Christmas bonus from employees without affording the Union prior notice and an opportunity to bargain.
>
> WE WILL provide employees with an annual Christmas bonus in accordance with our past practice and provide the Union with notice and an opportunity to bargain concerning any other changes in terms of conditions of employment . . . .

In addition, the Respondent agreed to pay the the amount of $500 as compensation for the 1990 Christmas bonus to those employed more than a year, and to pay in accordance with a pro rata formula for those employed for a lesser term. This was the very figure that the Respondent had paid in 1988 and 1989.

In terms of payment, the practice was followed in 1991, but the amount was reduced to $400. Moreover, the payment was made only to the actively employed. The General Counsel contends that the Respondent did not bargain in good faith in arriving at this figure, and in deciding to exclude former employees who earlier had been permanently laid off. The Respondent contends that any failure to negotiate was caused by the Union's intractable position.

The Christmas bonus issue was raised and discussed at only one formal negotiating meeting; namely, that held on December 9, 1991.[1] Those negotiations took place at that time against a background showing that the Respondent had declared that it was in the process of closing the sites within the appropriate unit, and that it had in fact already closed one in October, causing the ''layoff'' of 27 employees. The Respondent at this and other sessions was represented by its attorney, Fred Holroyd. During the meeting, Holroyd reminded the Union that the Company was shutting down the remaining mine, but that he did not know exactly when. During the main body of the meeting, discussion centered on the Union's concern that unit employees be allowed to transfer in the event that the Respondent reopened under a different name at a new location.

It was not until the end of the session that the bonus was mentioned. Thus, as Attorney Holroyd was leaving, a member of the Union's negotiating committee, Mark March, asked the former if the Christmas bonus would be paid. Holroyd replied that he did not know. The Union's attorney, Sherry Brashear, then stated, ''you paid it last year, you're going to pay it this year.'' Employee James Rouse added that

[1] All dates refer to 1991, unless otherwise indicated.

in the year he was hired, he was paid a prorated rate for that year and, perhaps, those laid off could be treated in that fashion. Holroyd indicated that if he had to pay, he would, but he did not know if those laid off would be paid. He indicated that he would check into it and reply by mail. There were no further bargaining sessions in 1991.

Holroyd wrote Brashear, on December 10, as follows:

> In regard to your proposal for a five hundred dollar Christmas bonus, after due reflection and consideration, the company proposes a three hundred dollar bonus to those now working and nothing for those who have quit or been terminated due to closing of the mines. [G.C. Exh. 2(a).]

By letter dated December 16, Brashear replied as follows:

> Regarding your letter of December 10, 1991, I take some issue with your characterization of our discussion regarding the Christmas bonus as a ''proposal.'' My client ''proposed'' nothing. We told you we expected your client to pay the Christmas bonus as it did last year. Such is in keeping with our position that the negotiations must resume where they left off because they are coterminous with the prior negotiations. *As long as we are negotiating, you are legally forbidden to change terms and conditions of employment*. Accordingly, you must pay the same bonus of $500.00 to the same employees as last year. [Emphasis added.]

In his letter of December 24, Holroyd replied as follows:

> I have your letter of December 16.
>
> In the past, bonuses were paid only to working employees based on the company's estimate of what should be paid. No set amount has been paid over the years.
>
> Since you decline to negotiate the issue this year, as is your obligation, I have advised the company to pay the proposed $300.00 per working employee. A [ham] will also be given out to working employees unless you object.

This was followed by a letter, dated December 26, from Brashear to Holroyd, which, in material part, stated:

> With regard to the bonus, it is our position you should also have paid all laid off non-probationary employees and at the same rate as last year, $500.00 each. We did not ''decline to negotiate the issue'' as you stated. First, we had no opportunity to negotiate and, second, we consider the bonus a term of employment not subject to your whim. [G.C. Exh. 2(d).]

As events unfolded, the Respondent actually paid a bonus of $400 to employees actively employed, but excluded those terminated the previous October.

The pleadings confirm that the Christmas bonus was a term and condition of employment. It was treated as such by the Respondent through entry of a settlement agreement premised on the fact that this was a mandatory subject of bargaining. Furthermore, in December 1991, the Respondent acknowledged that this was a fitting subject for negotiation, rather than a gift. Moreover, at least with respect to employees on active payroll status, it had been paid every year since 1985. As for those terminated prior to payment, the record is devoid of evidence that, at any time in the past, former employees were ever considered eligible for this benefit.

The duty to bargain in good faith removes discretion from an employer to revise existing terms of employment unilaterally and without providing the certified bargaining representative an opportunity to bargain. However, this does not mean that once a bargaining relationship is forged all terms are frozen until the union agrees to a proposed change. The obligation to bargain in good faith in these circumstances does not seek to adorn either side with tactical advantage alien to the process of give-and-take discussion. Thus, Section 8(d) does not provide the exclusive representative with a veto over an employer's proposed course of action.

> [B]efore instituting . . . changes of a kind which constitute a subject of mandatory bargaining, there is the statutory duty to first ''meet . . . and confer in good faith . . . .'' § 8(d). [I]t is a mistake to assume that where there has been such discussion and fair notice of the employer's intended actions, it is a violation of the law to institute such changes without securing the agreement of the Union.''[2]

For that reason, once the statutory representative is provided a reasonable opportunity to bargain, the employer is free to implement the proposed change if the Union either declines to bargain, or negotiations produce a genuine impasse.

Here, the General Counsel contends that ''the Union was never given the full-scope chance to bargain as envisioned by the Act.'' The Charging Party, through testimony of its attorney, denies that any proposal was made by the Union or by the Company, or that any negotiations took place with respect to the Christmas bonus.

Obviously, the argumentation by counsel is far from dispositive. The facts are that the Union's declaration at the December 9 meeting was at least an offer, which once accepted, would be binding. For example, it is undeniable that had the Respondent accepted the position articulated on December 9 through union representatives concerning terminated employees, the Respondent would have bound itself to an arrangement it could not thereafter renounce. Similarly, had the Union accepted the offer set forth in the Respondent's letter of December 10, it no longer could seek more. In each instance, an offer was on the table, which the other party could accept or reject. In short, the parties did exchange positions which clearly conveyed their respective positions. While ordinarily, a genuine impasse would require more than this initial exchange of offers, for reasons set forth below, the Respondent could not be faulted for the breakdown in negotiations. The key to analysis of whether the principles of good-faith bargaining were offended in this case lies in Attorney Brashear's December 16 letter, where she responds to Attorney Holroyd's proposal with the declaration that any change in the bonus is ''legally forbidden.''

On balance, it was the Charging Party, not the Respondent that manifested an intractable position with respect to the Christmas bonus. The former held firmly to the conviction that the Respondent already was compelled by law not to

[2] *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 481 (5th Cir. 1963).

vary the basis for payment it followed in 1990. That this, from the Union's point of view, was nonnegotiable was communicated to the Respondent both verbally and in writing. Thus, Attorney Brashear described her stated position at the December 9 negotiating meeting, as follows:

> —Holroyd said he didn't know about payment of the bonus. And I said—I took the position—I said that the Union—*I told Mr. Holroyd that the Union's position was that this was a term of employment that couldn't be changed, that they would have to pay it to all employees and they'd have to pay it to all employees and they'd have to pay $500, which is the amount they had paid the year before*. Mr. Holroyd asked the question, ''What about those folks who were laid off? Are you saying that they should be paid too? And I shook my head yes. Mr. Rouse [an employee member of the negotiating team] spoke up and said, ''Yes.'' [Emphasis added.]

Her understanding that the Respondent's obligation was mandated by law is consistent with her notes of that session which state: ''our 'position' have to pay.'' (G.C. Exh. 7.) If there was any doubt as to the Charging Party's posture, it was erased by Attorney Brashear's December 16 response to Attorney Holroyd's proposal on December 10, which states in no uncertain terms ''you must pay the same bonus of $500.00 to the same employees as last year.'' I would be inclined to agree with Attorney Brashear's that this view mirrored her communicated stance at the December 9 meeting. On both occasions, she defined the Union's position as an imperative, as distinguished from an invitation for give-and-take negotiation. In that sense, it is understandable that she would deny that the Union's demand for $500 for incumbent and terminated employees was not a ''proposal.''[3]

Section 8(d) contemplates that both parties have a will to negotiate. While the exchange of views in this case was abbreviated, anything more comprehensive was frustrated not by the Respondent, but by the Union. The Respondent was fully justified in construing Attorney Brashear's position for what it was; namely, that the employees had inherited a $500 Christmas bonus as a matter of right and it could not be removed by bargaining. The Union held firmly to the belief that the benefit was frozen by past practice to the same extent as if embedded in an existing collective-bargaining agreement.[4] It was a posture born of mistake, but, at the same time, one that left no room for discussion. *Louisiana Dock Co*., 293 NLRB 233, 235 (1989). In essence, negotiations were aborted not because the Respondent ''performed a half-hearted pretense of bargaining,'' as the General Counsel puts it, but because the Union plainly communicated, both verbally and in writing, that the law already guaranteed what it wanted. ''The Union cannot be heard to protest the Respondent's unilateral actions, inasmuch as it was the Union's own acts which foreclosed effective negotiations.'' *Young & Hay Transportation Co*., 214 NLRB 252, 253 (1974). I agree with the observation in the Respondent's posthearing brief that ''The Union . . . slammed the door on negotiations and refused to move.''

Considering the Union's posture, and that timing is an essential element of the benefit in question,[5] the Respondent was under no duty to probe further. As matters stood, the Union had been offered a reasonable opportunity to negotiate, yet showed disinterest. In these circumstances, the quality and quantity of the exchanges between the parties would not, ipso facto, preclude the Respondent from implementing any proposal as to the amount of the Christmas bonus made earlier to the Union.

The General Counsel also contends that any negotiations that did take place failed to provide the Union an opportunity to negotiate ''over who was to receive the bonus.'' Insofar as this record discloses, this claim relates to the Respondent's failure to pay employees permanently laid off several weeks earlier. The General Counsel cites no authority, and I am unaware of any, to the effect that employees, after severance of their employment, are presumed to possess a continuing, ongoing interest in employment terms that emerge after their employment has ended. In fact, the legal assumption is to the contrary,[6] and the General Counsel has the burden of establishing either by reasonably grounded inference or direct proof that the benefit was vitally related to the terms and conditions of active employees in the bargaining unit, or, at a minimum, that the 1991 benefit was earned prior to termination.[7] Here, the pleadings lack the specificity to substantiate an admission that the payment of the bonus to terminated employees was a mandatory subject of bargaining, and there is absolutely no evidence that, prior to 1991, it had been paid to nonemployees.[8] While there was no bargaining as to who would be paid, this record fails to substantiate any arguable premise for concluding that the Respondent had a duty to bargain as to those outside the unit by reason of prior termination.

On the other hand, as a general proposition an employer is not free, after impasse, to implement a proposal at variance with that previously offered and rejected. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949). Here, the Christmas bonus actually provided was $100 more than offered the Union in 1991 and $100 less than paid in 1990. However, the circumstances are not akin to a situation in which the employer's uncommunicated position could have

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[3] On the heels of a bevy of prejudicially leading questions propounded by the General Counsel, Attorney Brashear averred that the Union did not ''at any time decline to bargain with [the] Employer concerning bonus payment.'' This response is betrayed by her written words and specific testimony as to the verbal exchange with the Respondent.

[4] ''It is well established that an employer is precluded from modifying a contract which is in effect, without consent of the union.'' *KCW Furniture Co*., 247 NLRB 541, 542 (1980).

[5] From my understanding of Brashear's testimony the Respondent was blameless for the failure to reconvene prior to the holidays. The Union made no request for such a meeting. Moreover, Brashear implies that a resumption during that timeframe would have posed a personal inconvenience.

[6] See, e.g., *Allied Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971), wherein it is stated that '''employees' within the meaning of the collective bargaining obligations of the Act . . . [excludes] . . . those whose work has ceased with no expectation of return.'' 404 U.S. at 172.

[7] See, e.g., *Radio Television Technical School v. NLRB*, 488 F.2d 457, 460 (3d Cir. 1973).

[8] Harold Sigler, an owner of the Respondent, in effect, testified, without contradiction, that the bonus was never paid to persons who, due to permanent shutdown of mining sites, were previously laid off, without expectancy of recall.

had a salutary effect on the negotiations. On this record, it is apparent that all opportunity for agreement was preempted by the Union's mistaken belief that the entire subject was nonnegotiable, and its erroneous assumption that the employer was locked into last year's benefit level.[9] Thus, having declared consciously and unambiguously that anything less would not be a fitting subject for bargaining, the Union, in effect, waived its interest in the subject matter.[10]

On the foregoing, it is concluded that the General Counsel has failed to establish by a preponderance of the evidence that any aspect of the Respondent's conduct with respect to the Christmas bonus violated Section 8(a)(5) and (1) of the Act.

[9] Similarly, in *U.S. Lingerie Corp.*, 170 NLRB 750, 752 (1968), a union's erroneous legal position was irreconcilable with an interest in bargaining over an employer's planned unilateral action, in the form of a removal of operations. There, the Union sought to enforce a multiemployer agreement on the employer on mistaken assumption that the later had not effectively withdrawn from multiemployer bargaining, and ''was clearly not interested in bargaining with Respondent on an individual basis.'' In accord, *Louisiana Dock Co*., supra.

[10] In passing, it is noted that were I to sustain the complaint on the basis of the limited bypass involved here, appropriate relief would not include a reimbursement provision, for the circumstances would be the analogue, for remedial purposes, of a grant of benefit. See, e.g., *Tritac Corp*., 286 NLRB 522, 545 fn. 95 (1987).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, on or about December 24, 1991, did not change its 1991 Christmas bonus under conditions reflecting a refusal to bargain in good faith, and hence did not violate Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.